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CHARLES ELMORE

No. 724

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

UNITED STATES OF AMERICA ex rel.,
ANTHONY VOLPE,
Petitioner,

vs.

S. D. SMITH, District Director of Immigration,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF TO SUGGESTION OF ABATEMENT.

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REPLY TO SUGGESTION OF ABATEMENT.

Comes now Anthony Volpe, petitioner, by his attorney, and respectfully makes the following reply to the suggestion of abatement herein:

We take issue with and deny, on information and belief, the statement that Smith ceased to hold "office" as District Director of Immigration in January, 1932. Counsel for petitioner were informed on March 21, 1933, by the United States Attorney's office at Chicago that S. D. Smith is still an officer and employee of the Bureau of Immigration, and still holds and uses the title of District Director of Immigration. Surely petitioner's counsel are not chargeable with knowledge of Mr. Smith's exact title.

under penalty of abatement, when government counsel themselves differ on the matter.

In addition, the basic statement in the suggestion of abatement is contradictory and repugnant to the jurisdictional statement in respondent's Petition for Rehearing in the Circuit Court of Appeals. The suggestion of abatement states that

> "We are advised by the Department of Labor that Smith ceased to hold office as District Director of Immigration in January, 1932, and that he was succeeded by C. Alfred Palmer, who was appointed January 14, 1932, entered upon the duties of the office February 1, 1932, and took the oath of office March 3, 1932."

Contradictory to this is the fact that on July 19, 1932, the United States attorney at Chicago filed in the appeal in this matter in the Circuit Court of Appeals a petition for rehearing, beginning with the following statement:

> "Comes now S. D. Smith, District Director of Immigration, by George E. Q. Johnson, United States attorney, and presents this his petition for rehearing of the above entitled cause and in support of his petition respectfully shows:"

Thus more than six months after Smith ceased (as claimed) to hold the title of District Director of Immigration, the government attorney filed a petition and brief claiming that Smith still held the title. This was a representation to the court and opposing counsel in July, 1932, that Smith then held the title. We submit, the government is now estopped from claiming abatement.

The abatement statute (Sec. 11, Act Feb. 13, 1925, c. 229, 43 Stat. 936, 941; 28 U. S. C. A. 780) is permissive merely, not mandatory. *Brown-Crummer Inv. Co.* v. *City of Florala*, 55 F. (2) 238, (D. C. Ala., J. Kennamer). Therefore it seems clear that the principles of estoppel and waiver are applicable.

In addition, we respectfully submit, Mr. Smith, the respondent, has not ceased to hold the office which caused him to be made a party to the suit. This office is that of immigration inspector, to which he has necessarily been appointed in accordance with the provisions of the Civil Service Acts (see Sec. 24, Act of Feb. 5, 1917, 8 U. S. C. A. 109). On information and belief we state that Smith now holds the office of immigration inspector. By failure to deny it, the suggestion of abatement in effect admits that Smith still holds that office. The words "District Director of Immigration" are merely a descriptive title adopted by the Department of Labor for its own convenience and to indicate apparently comparative ranking as an inspector. Regardless, however, of whether or not Mr. Smith still uses the title of District Director of Immigration, he still holds the same office, that of inspector. The title "District Director of Immigration" is not used in the statutes, so far as we have been able to find, unlike the offices of immigration inspector and commissioner of immigration, both of which are created by statute. (Sec. 24, Act Feb. 5, 1917, 8 U. S. C. A. 109.)

If, however, we assume for purpose of argument that Smith is no longer accorded the title of District Director of Immigration the government claim then seems to be in substance that Mr. Smith has been demoted or reduced in rank as an inspector and that this is cause for abatement. However, such demotion doubtless is a matter of internal departmental administration, of which petitioner and his attorneys in natural course would have no knowledge. It certainly could not have been contemplated by Congress in enacting the abatement statute, that litigants with the government should be required to keep themselves informed of the demotions and changes in rank of employees of the governmental departments on peril of having litiga-

should now be estopped from contending otherwise. We submit also that an extremely technical objection of this nature should not induce this court to forego decision of the questions involved which are of great importance not only to petitioner but many others in like situation, and which now by reason of conflicting decisions of the inferior courts, are causing confusion in the administration of the immigration laws.

Respectfully submitted,

FRANK R. REID,
Attorney for Petitioner.

JOHN ELLIOTT BYRNE,
Of Counsel.

March, 1933.